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Squaring the Circle? Bringing Deliberation and Participation Together in Processes of Constitution-Making

Silvia Suteu and Stephen Tierney*

1. Introduction

This chapter looks at recent participatory exercises in constitutional reform and aims to help further define and tailor standards for deliberative democratic good practice in constitution-making. Among the models of popular participation which we discuss are constitutional referendums such as Scotland's independence referendum; citizens' assemblies such as those set up in British Columbia, the Netherlands, and Ontario; and constitutional conventions such as in Iceland and Ireland. On the one hand, these types of popular engagement very different from each other, and so too are the issues with which they are concerned, with mandates ranging from electoral reform to recommendations for constitutional amendments; to drafting an entirely new fundamental law; to, finally, deciding on the creation of a new state. On the other hand, they are all indicative of a trend in current constitutional practice. The recourse to the people has become *the* tool for constitutional legitimation, both internally and in the search for external validation.

What is notable in terms of participatory practice is that the emphasis on fostering deliberation, in the Rawlsian sense of an environment conducive to public reason,¹ is highly varied. In some, such as citizens' assemblies, there are clear efforts towards facilitating micro-setting deliberative conversations. But both when these processes are extended to the macro-level referendum process, and in the other situations we address, appeals to deliberation are often either entirely overlooked or are tacked on seemingly as an after-thought to further strengthen legitimacy claims.

This chapter aims to disentangle the principles required by, respectively, participatory and deliberative processes in constitution-making. While there is significant overlap between them (such as conditions of inclusiveness and transparency), important differences exist. Questions about the balance between the respective roles of elite and popular actors; the size and working methods of the constitution-making body; the role attributed to 'expert' and various other actors in the process; and the rules of decision-making will each result in different answers when looked at through a participatory or a deliberative lens. Our chapter seeks to help disaggregate these discrete aspects of popular democracy and in doing so to offer some much needed clarity given such diffuse proliferation of popular constitutional processes.

We discuss the turn towards deliberative mechanisms in constitutional change and recent seminal examples. We then draw out some of the problems in connecting small group deliberation to polity-wide participation. We conclude with some thoughts about how these two strands in popular constitutional engagement might be better connected.

2. The turn to participation and deliberation in constitutional practice

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¹ John Rawls, *Political Liberalism* (expanded edn, Columbia University Press 2005) 446-47.

The participation of citizens in constitutional change has come partly as the by-product of the proliferation of referendums, and partly through experiments in micro-processes of participation: citizens' assemblies, constitutional conventions, citizen juries, etc. Indeed, the two developments are not unconnected. It is frequently the case that the deliberations of the smaller group presage a wider regional or national popular process, most commonly through a subsequent referendum. The citizens' assembly processes in British Columbia 2004, the Netherlands 2006, and Ontario 2006 are examples of this, as are the Icelandic and Irish constitutional conventions.

While this sequencing has been the most common one in practice, we can also envisage it the other way around: a referendum as providing the mandate for constitutional change through deliberation, including via micro-deliberative forums. This is what the Scottish Government promised had there been a vote for independence: to set up a constitutional convention tasked with drafting Scotland's permanent constitution.² Had these plans gone forward, they would have provided an example of participation reinforcing the mandate for deliberation, possibly making it more difficult for the outcome of the deliberative exercise to be sidelined politically (which has happened to an extent in all examples of constitutional conventions).

i. The role of the referendum in explaining the participation/deliberation relationship

The proliferation of referendums has taken place in a number of important areas of constitutional decision-making: the creation of new states; the creation and amendment of constitutions; the establishment of complex new models of sub-state autonomy, as we have seen in the UK and Spain; and the accession to and the transfer of sovereign powers from European states to the European Union.³ It is perhaps on account of the prominence of these issues that focus is growing upon *the ways in which* decisions are made when the public is given a direct say in fundamental constitutional questions.

In certain cases, and under the right conditions, it does seem that referendums can be positive ventures in promoting participation. However, it is less clear that they also promote deliberation, in the sense of inducing 'public reason' – in terms of the open exchange of reasons in public fora and the preparedness of participants to listen, reflect and, if they feel it correct to do so, to change their views.

There are two major problems that are often identified in referendum practice which prevent the fostering of a genuinely deliberative decision-making process. These we can call 'the elite control syndrome' and 'the deliberation deficit'. The former is the idea that referendums promise popular power, including control over elites, but are themselves so open to manipulation as to belie that promise. The charge is that elites can dominate the process of referendums in such a way as to procure a particular result. By Lijphart's famous formulation, 'most referendums are both controlled and pro-hegemonic'.⁴ In this sense, people do participate in a referendum, but this participation is a veneer. The strings are really being pulled by the elite, usually the

² The Scottish Government, *The Scottish Independence Bill: A Consultation on an Interim Constitution for Scotland*, June 2014, 61.

³ Stephen Tierney, *Constitutional Referendums* (Oxford: Oxford University Press 2012).

⁴ Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press 1984) 203.

government, which have set the referendum and which can control crucial process elements such as question-setting, timing and funding/spending rules, to deliver the result they want.

This raises a broader question: what is meant by citizen participation in electoral democracy? Voting is in a sense the thinnest form of participation. But it tends to be how participation is evaluated: How many people register to vote? How many people vote? However, participation should not just involve voting. Do citizens really engage in public reasoning at these electoral moments or are their choices conditioned by politicians?

This then leads to the second main criticism of referendums (although it is a critique that also resonates with elections more broadly). The idea of a deliberation deficit suggests that referendums by their nature facilitate or indeed encourage the mere aggregation of individual wills and in doing so fail to foster either the acquisition of information by, or the active deliberation of, citizens. In other words, not only is the citizen's role passive and conditional, it is also very often one which the citizen does not prioritise as particularly significant. By this argument, people enter the referendum process with pre-formed views and therefore the referendum, as a simple act of voting Yes or No, becomes a conduit through which these views can be expressed, often hastily, without discussion or reflection, and hence without any possibility that minds might be changed and preferences transformed.

Again this criticism causes us to reflect upon deliberation as being much more than just participation. Whereas the latter is concerned primarily with who and how many people may take part in a decision-making process, the deliberation deficit focuses on the *how* of participation: how do people make decisions? What is the quality of the process?

The aims of a deliberative process will be explored below, but a key goal is the *active* participation of citizens. It can be argued that it is not enough that citizens participate in a passive, voting capacity; instead there should also be efforts to foster more involvement in reflection and discussion, but also, crucially, in helping to frame the issue at stake and in playing an earlier and more proactive role in the making of the decisions that flow from this issue-framing role. This also suggests that there is certainly overlap between the two core ideas of participation and deliberation. The elite control and deliberation deficit criticisms recognise that participation exists but the charge is that this participation is thin, often involving the act of voting, but perhaps not much else.

ii. Small groups: filling the deliberation gap – but only for some?

What we have seen in recent decades is the development of smaller group engagements with citizens, including mechanisms for achieving constitutional change. There is now an array of tools, both formal and informal, which countries around the world have used to achieve legislative and constitutional reform. These experiments with deliberative mini-publics, understood as 'forums, usually organised by policy-makers, where citizens representing different viewpoints are gathered together to deliberate on a particular issue in small-N groups',⁵ range from citizens' assemblies and constitutional conventions to citizen juries, deliberative polls and

⁵ K Groenlund, A Baechtger and M Setälä, *Deliberative Mini-Publics: Involving Citizens in the Democratic Process* (ECPR Press 2014) 1.

participatory budgeting. Indeed, among the numerous mechanisms for public engagement – one study has listed over 100 different types⁶ – mini-publics themselves seem to be on the rise.

Among all these, citizens' assemblies have been deemed to stand out as 'the most extensive modern form of collective decision-making by common folk' and as representing 'the only method of citizen policymaking that combines all the following characteristics: a relatively large group of ordinary people; lengthy periods of learning and deliberation; and a collective decision with important political consequences for an entire political system'.⁷ The cases of British Columbia, the Netherlands and Ontario may be considered antecedents, with British Columbia in particular being a ground-breaking experiment with a citizens' assembly, sparking a 'demonstration effect' in the other two⁸ and, subsequently, in Iceland and Ireland.⁹ All three antecedents were aimed at effecting electoral reform, which although clearly a constitutional issue, is narrow in scope. The citizens involved had several months to learn about and deliberate on the best electoral system for their respective polity, with significant resources devoted to facilitating their work. These three cases shared a commitment to participatory and deliberative democracy aimed at 'inject[ing] some popular legitimacy into policymaking'.¹⁰

Citizens' assemblies have also provided the model for constitutional conventions which, unlike the elite-driven constitution-making bodies of the past,¹¹ seek the direct involvement of ordinary citizens in processes of piecemeal or full-scale constitutional revision. Understood generically as a 'representative body collected together to discuss constitutional change',¹² citizens' assemblies – termed by some 'people's conventions' – are united by several traits. Perhaps the most important commonality is the centrality of citizens tasked with deciding important constitutional reforms in a deliberative setting. According to one author, the shared characteristics of such bodies are that: (1) they 'address big, national questions of constitutional/institutional design;' (2) they 'are established by government to meet a certain objective in time-delimited fashion;' (3) they are 'deliberately and distinctly treated as a supplement (rather than competitor) to the existing system of representative democracy;' (4) they include ordinary citizens; (5) their 'membership is based on random selection rather than election' (although this is not always true, as shown by Iceland); (6) the roadmap for the deliberative process is clear from the start and (7) 'the heart of the enterprise is deliberation'.¹³ Cases such as Iceland 2009-2011 and Ireland 2012-2014, as well as the lesser known Romanian National Forum 2013 and Estonian Citizens' Assembly Process 2013, involved citizens' assembly-style constitutional conventions tasked with

⁶ Gene Rowe and Lynn J. Frewer, 'A Typology of Public Engagement Mechanisms', *Science, Technology, & Human Values*, 30:2 (2005), 257.

⁷ Patrick Fournier et al., *When Citizens Decide: Lessons from Citizens' Assemblies on Electoral Reform* (Oxford University Press 2011) 10.

⁸ Ibid., 28.

⁹ For more on the experience of British Columbia, see Mark E. Warren and Hilary Pearse, *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press 2008).

¹⁰ Fournier, *When Citizens Decide*, 18.

¹¹ See Andrew Arato, 'Forms of Constitution Making and Theories of Democracy' 17:2 (1995) *Cardozo Law Review* 191 and 'Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making', (2012) 1:1 *Global Constitutionalism* 173.

¹² House of Commons Political and Constitutional Reform Committee, *Do We Need a Constitutional Convention for the UK?*, Fourth Report of Session 2012-13, 25 March 2013, 9.

¹³ David M. Farrell, 'The Irish Constitutional Convention: A Bold Step or a Damp Squib?' in John O'Dowd and Giuseppe Ferrari eds., *75 Years of the Constitution of Ireland: An Irish-Italian Dialogue* (Clarus Press 2013) 191, 195.

preparing concrete recommendations for constitutional reform, and in the Icelandic case, a full constitutional draft.

Iceland's process involved two large national forums in 2009 and 2010 (numbering 1,500 and 950 members, respectively) and a 25-strong elected Constitutional Council working over several months in 2011 to produce a draft for a new constitution on the basis of these forums' recommendations. A referendum was held in October 2012 and asked, among six questions, whether the Constitution Council's proposals should form the basis of a new draft Constitution. Despite the proposition being approved in the referendum, the draft never came into force, having failed to be adopted by Parliament and dropping from the list of priorities following new elections in 2013.

Ireland's case was different, in that the major political parties agreed that constitutional reform was needed.¹⁴ The 2011-2016 Programme for Government¹⁵ indicated that a Constitutional Convention would be established to operate for twelve months and 'to consider comprehensive constitutional reform' on eight major issues. Moreover, amidst the legislative activity towards establishing a constitutional convention, a group of academics, inspired by other recent experiments with citizens' assemblies, set up the *We the Citizens* initiative,¹⁶ whose 'aim was to demonstrate the virtue of deliberative approaches by holding our own (pilot) citizens' assembly'.¹⁷ The Parliament established the Constitutional Convention in 2012 – which was to consist of 100 members, a third of whom were to be politicians – and run for a period of 12 months. The convention was to produce reports on eight issues listed in its terms of reference but could also propose 'such other relevant constitutional amendments' as it deemed fit. Importantly, the Government committed to responding to the Convention's reports within four months as well as to indicating a timeframe for submitting accepted recommendations to a referendum. The response from the government was, in the end, mixed (more on this below), and of the two constitutional amendments submitted for a referendum only one has been successful.

There are several problems with arguments that such micro-deliberations can solve participation's woes. First, there are anterior questions about the very legitimacy of those who engage in small group deliberation: How are small groups appointed? Whom do they represent and how is that representative role guaranteed? John Parkinson puts it this way: 'How can micro deliberation be democratic at all, given that it cannot include even a small number of those affected, let alone all of them'?¹⁸ Some suggest that small groups, if representative, can speak for the people as a whole. Dahl argues that: 'The judgments of a minipopulus would "represent" the judgment of the demos ... [and] would thus derive their authority from the legitimacy of

¹⁴ See the Parliament Joint Committee on the Constitution recommending the establishment of a citizens' assembly to consider the question of electoral reform. Joint Committee on the Constitution, Fourth Report, 'Article 16 of the Constitution: Review of the Electoral System for the Election of Members to Dáil Éireann [House of Deputies]', Final Report, July 2010, available at http://www.oireachtas.ie/documents/committees/30thdail/j-constitution/report_2008/20100722.pdf. See also Farrell (2013), pp. 2-3.

¹⁵ Programme for Government 2011-2016, available at http://www.taoiseach.gov.ie/eng/Work_Of_The_Department/Programme_for_Government/Programme_for_Government_2011-2016.pdf.

¹⁶ See <http://www.wethecitizens.ie/>.

¹⁷ Farrell et al. (2013), p. 102.

¹⁸ John Parkinson, 'Beyond "Technique": The Role of Referendums in the Deliberative System' (Referendums and Deliberative Democracy workshop, University of Edinburgh, 8 May 2009); see also John Parkinson, 'Legitimacy Problems in Deliberative Democracy' (2003) 51 *Political Studies* 180.

democracy'.¹⁹ But can we be so sure that this is accurate? Surely the risk is that we merely invent a new system of representative decision-making, the detachment of which popular involvement was supposed to remedy. And indeed, this may be less democratic than party politics, where representatives are at least answerable to the electorate. Therefore, it seems that small group deliberation, to be valid, must be seen as an intervention within broader citizen participation, and not a substitute for it. As Fishkin argues, 'internal validity' must be complemented by 'external validity'.²⁰

The case studies discussed here have employed different methods of selection. British Columbia, for instance, resorted to a near-random draw from the electoral registry, later stratified by age and gender, to select and then invite its initial 160 members; two more members were later added to correct the absence of aboriginal representation.²¹ Iceland's 2009 National Forum was made up of 1,200 randomly selected citizens and 300 representatives of interest groups and institutions, divided into 162 tables.²² The second National Forum was held in November 2010 and was made up of around 950 (quasi-)randomly selected citizens; despite attempts to the contrary, it was only partially representative (although there was gender balance there were significant variations in representation based upon age and geography) and there was a strong element of self-selection in its composition.²³ The Icelandic Constitutional Council, however, was to have between 25 and 31 members and be elected in a special election. The latter took place in October 2010, with 25 members being elected out of 522 candidates based on a 35% voter turnout.²⁴ In Ireland, the Constitutional Convention's membership was to consist of:

a Chairperson to be appointed by the Government, 66 citizens entitled to vote at a referendum, randomly selected so as to be broadly representative of Irish society, a member of the Northern Ireland Assembly from each of the political parties in the Assembly which accepts an invitation from the Government; and members of the Houses of the Oireachtas, so as to be impartially representative of the Houses.²⁵

The Irish Convention thus had to ensure not just the representativeness of its regular citizens, but also of the 33 politician members. This involved inviting representatives of Irish and Northern Irish parliamentary parties and resulted in 29 members of the former (chosen so as to be 'impartially representative of the Houses'²⁶) and four of the latter.²⁷

¹⁹ Dahl, *Democracy and Its Critics*, 342.

²⁰ Fishkin, 'Deliberative Democracy and Constitutions', 251.

²¹ Archon Fung and Mark Warren, 'British Columbia, Canada: Citizens' Assembly on Electoral Reform' (Bertelsmann Stiftung 2011) 6 http://participedia.net/sites/default/files/case-files/653_303_Case_Study_British_Columbia.pdf.

²² For more on the forum, see its website: <http://www.thjodfundur2009.is/english/>.

²³ Hélène Landemore, 'Inclusive Constitution-Making: The Icelandic Experiment', *J Political Philos* 23: 2 (2015) 166, 177-78.

²⁴ The results of the election were successfully challenged before the Supreme Court, which invalidated the results. Despite this ruling, a parliamentary resolution was adopted in March 2011 appointing the 25 delegates originally elected to the Assembly.

²⁵ See Resolution of the Houses of the Oireachtas of July, 2012, available at https://www.constitution.ie/Documents/Terms_of_Reference.pdf.

²⁶ Dáil Éireann Debate, Constitutional Convention: Motion, 10 July 2012, <http://debates.oireachtas.ie/dail/2012/07/10/00026.asp>.

The fear that in setting up micro-deliberative forums we are merely replacing one representation model with another, possibly less accountable one is thus not ill-founded. In Iceland, the election for the Constitutional Council was successfully challenged before the Supreme Court on the basis of procedural irregularities but its results were later validated by the parliament appointing the same 25 winners. This casts doubts on the legitimacy of the body's membership and its claim to represent the body politic.

The statistical models of representation used in British Columbia and Ireland are also not without their critics. In Ireland, for example, there were fears that the selection mechanism had ended up excluding marginalised groups – a particularly concerning outcome given their centrality to some of the issues up for consideration by the Convention (same-sex marriage, reducing the voting age, the status of women etc.). Thus, while the majoritarian danger of referendums has to do with the decision-making method itself, the potential for an outcome that is not representative of all societal views, or of all views likely to be affected by constitutional change, is relevant to constitutional conventions as well.

A second danger here is that we encounter the reverse problem to that of macro citizen-engagement. If the focus turns too much towards the details of good deliberation, we can lose sight of the importance of mass participation as an essential step in the democratic validation of any decision. Whereas with a referendum it can be argued that a deliberation deficit ensues, with a small group assembly we also face a potential participation deficit. All examples of micro-deliberation discussed above were concerned with trying to connect the small deliberative exercise to a broader public engagement. They attempted to achieve this in two ways. One was to set up public consultations and outreach initiatives and thereby both inform citizens of the ongoing work of these bodies and seek popular input during the process, in the form of formal and informal submissions. The other was to resort to referendums as a popular endorsement of the result. A closer look at the manner in which these aims were pursued, however, indicates that there was not always an awareness of the differing dynamics of broader participation and the deliberation exercises, nor of how to integrate them.

Public outreach was promoted as a key feature in all the examples mentioned. For instance, the Icelandic Constitutional Council actively sought both to inform the public of its progress (by posting on its website meeting schedules and minutes, news, a newsletter etc.), as well as to have it participate and make suggestions along the way and for this purpose set up various social media platforms (Facebook, Twitter, Flickr, YouTube). By the end of the Council's work, the public had made some 360 proposals and more than 3,600 comments on the various available platforms.²⁸ The most significant aspect of the process, and what earned the resulting draft the moniker of 'world's first crowdsourced constitution', was that a feedback loop was established between the Council members and the public, with their feedback being integrated at various points in the drafting process.²⁹

²⁷ Six Northern Irish parties had been invited to send one representative each but the unionist parties declined to do so. See Mary Minihan, 'Unionist parties decline invitation', *The Irish Times*, 1 December 2012, <http://www.irishtimes.com/news/unionist-parties-decline-invitation-1.209>.

²⁸ Landemore, 'Inclusive Constitution-Making', 182.

²⁹ *Ibid.*, 174.

Similarly, the Irish Convention invited submissions on the items on its list, including from Irish citizens living abroad,³⁰ and received thousands, especially on the more controversial issues such as same-sex marriage or the relationship between church and state.³¹ The Convention also sought public input on items to be added to its agenda, and held regional meetings in October-November 2013 for this purpose.³²

Whether and to what extent these submissions and comments from the public had an actual impact on the members of these constitutional conventions is less clear. For example, Iceland's Constitutional Council provided 'irregular, informal, and limited' feedback to the suggestions received from the public, possibly due to the lack of resources and lack of institutionalisation of feedback-giving.³³ The extent of citizen involvement also seems problematic, as evidenced by the small number of unique commentators on the Council's online platforms and by the insufficient involvement of older, less technologically-savvy, or less motivated individuals.³⁴

When discussing the recourse to referendums in validating the findings of these small groups, we return to the initial dilemma, which is the difficulty of fostering deliberation in a mass process of popular engagement. This is not an insignificant issue. For example, it is notable that for all the energy put into the micro-process of the British Columbia Citizens' Assembly on Electoral Reform, the referendum process was markedly less successful in fostering deliberation when the process moved to the referendum campaign.³⁵ Ian Ward cites one poll carried out the February before the May referendum where 'only half ... of British Columbians say they [had] read, seen or heard anything'³⁶ about the Assembly and shortly before the referendum nearly two-thirds of British Columbians still knew 'very little' (39%) or 'nothing' (25%) about the electoral system being proposed.³⁷ It seems that in this process and in the similar one in Ontario in 2007,³⁸ far more energy and resources were expended on the micro-process than in providing information, education and in fostering deliberation at the macro-level.³⁹ Ward concludes that this suggests:

a troubling disconnection between the public and the Citizen's Assembly. For all the efforts of its members and support staff to publicise its activities and to obtain public

³⁰ 'Convention Calls on the Diaspora', Department of Foreign Affairs, <http://web.dfa.ie/home/index.aspx?id=89511>.

³¹ Submissions are available online on the Constitutional Convention's website, <https://www.constitution.ie/Submissions.aspx>.

³² 'Constitutional Convention announces public meetings nationwide', *Irish Examiner*, 14 October 2013, <http://www.irishexaminer.com/breakingnews/ireland/constitutional-convention-announces-public-meetings-nationwide-610056.html>.

³³ Landemore, 'Inclusive Constitution-Making', 182.

³⁴ *Ibid.*, 183.

³⁵ Dennis Pilon, 'The 2005 and 2009 Referenda on Voting System Change in British Columbia' (2010) 4(2-3) *Canadian Political Science Review* 73.

³⁶ Ipsos-Reid, 'BC Public Has A Lot To Learn About BC-STV' (*Ipsos*, 21 February 2005) <<http://www.ipsos-na.com/news-polls/pressrelease.aspx?id=2566>>, cited by Ian Ward, 'The British Columbia Citizens' Assembly on Electoral Reform. An Experiment in Political Communication' (Australasian Political Studies Association conference, University of Newcastle, 25-27 September 2006) <<http://www.newcastle.edu.au/Resources/Schools/Newcastle%20Business%20School/APSA/PUBPOLICY/Ward-Ian.pdf>>.

³⁷ *Ibid.*

³⁸ Karen Howlett, 'Referendum? Now What Referendum Would That Be?' *Globe and Mail* (Toronto, 24 September 2007) <<http://www.theglobeandmail.com/archives/article783471.ece>>; LeDuc, 'Electoral Reform'.

³⁹ Richard Simeon, 'The Referendum Experience in Canada' (Referendums and Deliberative Democracy workshop, University of Edinburgh, 8 May 2009).

input through public hearings and submissions via the internet, significant numbers of British Columbians appear to have been unaware of the Assembly's existence and mission. This is a gap which will need to be closed if indeed citizens' assemblies are to be used in the future to counter the democratic deficit.⁴⁰

In Iceland's 2012 referendum, turnout was 49%, a perhaps meagre figure considering the clamour (both figurative and literal) of the 'pots and pans revolution' that took down the government in 2010 and set in motion the process of constitutional reform. Ireland's two referendums held on the basis of recommendations made by the Constitutional Convention were comparatively more successful. The marriage equality referendum saw a 62% turnout⁴¹ and the referendum on reducing the age of eligibility to run for president a 73% turnout.⁴² The total budget for running both referendums, €15 million, also far exceeded the budget of the Constitutional Convention (estimated at around €900,000).⁴³ The former in particular has been lauded as 'a victory for a well-planned, positive, personal campaign over the old-style negative playbook'.⁴⁴ Thus, the Irish process may be said to have benefitted from lessons learned from its predecessors. However, others have noted that the marriage equality referendum campaign 'often contrasted sharply with the Convention's more respectful, informed deliberative process' and that the shift in public attitudes following the campaign, while still positive, was lower than the shift which had occurred during deliberations in the Convention.⁴⁵

A third broad concern may be summed up as follows. A carefully crafted micro-level process, even one with credible representational legitimacy, is not itself an act of demotic constitutional authorship; it can only establish in a fair way the issue and perhaps the process guidelines for the mass exercise in popular deliberation that would constitute such an act. (This is what happened in both Iceland and Ireland, for example, where governments chose the wording and timeline of the referendums based on the work of the respective constitutional conventions.) This begs the question: when the question is set and the referendum campaign put in motion, is any appreciable level of state-wide, mass popular deliberation also feasible? The very idea that a constitutional referendum can be an act of constitutional authorship by a public acting together hinges on the idea that millions of people can and will deliberate on the question. This is the key issue for democratic deliberation, particularly in the ambitious attempt to situate it in a referendum process: it is not enough that a small group of citizens participate; the democratic commitment is

⁴⁰ Ward, 'The British Columbia Citizens' Assembly on Electoral Reform'.

⁴¹ Results received at the Central Count Centre for the referendum on the Thirty-fourth Amendment of the Constitution (Marriage Equality) Bill 2015, <http://referendum.ie/results.php?ref=10>.

⁴² Results received at the Central Count Centre for the referendum on the Thirty-fifth Amendment of the Constitution (Age of Eligibility for Election to the Office of President) Bill 2015, <http://referendum.ie/results.php?ref=11>.

⁴³ Juno McEnroe, 'Presidential referendum was 'waste of money'' (*Irish Examiner*, 25 May 2015), <http://www.irishexaminer.com/ireland/presidential-referendum-was-waste-of-money-332620.html> and Robert Hazell, 'You want a constitutional convention? This is what you need to think through first' (*The Constitution Unit blog*, 8 October 2014), <http://constitution-unit.com/2014/10/08/you-want-a-constitutional-convention-this-is-what-you-need-to-think-through-first/>.

⁴⁴ Jane Suiter, 'Lessons from the Yes and No campaigns' (*The Irish Times*, 27 May 2015), <http://www.irishtimes.com/opinion/jane-suiter-lessons-from-the-yes-and-no-campaigns-1.2226705>.

⁴⁵ Clodagh Harris, 'Ireland's Marriage Referendum: A great day for equality and deliberation' (*Deliberative Hub*, 3 June 2015), <https://deliberativehub.wordpress.com/2015/06/03/irelands-marriage-referendum-a-great-day-for-equality-and-deliberation/>.

to the widespread participation of the people as a whole, so that the outcome of the deliberation can be seen as genuinely an act of collective decision-making.

However, in turning to the prospects for deliberation at the mass level we encounter new difficulties. Parkinson alerts us to the dangers:

[I]f we attempt to increase the numbers involved and be more “democratic”, we run the risk of reopening the doors of the forum to manipulation of agendas, to speech-making rather than deliberation; to the attempt to sway an audience, often at the expense of, rather than out of feelings of reciprocity towards, one’s interlocutors ...; that is, to the pathologies of public debate that drove many to embrace normative deliberative democracy in the first place.⁴⁶

There is also the question of the very possibility of such a process as raised by Walzer: ‘Deliberation is not an activity for the demos ... 100 million of them, or even 1 million or 100,000, cannot plausibly “reason together”’.⁴⁷ To some extent it is simply a practical problem: how can one instigate such a process of national deliberation, finding time to do so etc. in the course of a referendum campaign? Certainly it is impossible to set the same goals as those for small group deliberation given the role of the small group in allowing each participant to raise issues and to have those subjected to critical exploration in dialogue with others. From all of this we see just how starkly different are the notions of participation and deliberation in democratic politics.

Thus we seemingly have a paradox. To create the conditions for proper deliberative discussion we must sacrifice mass democratic participation, and to reach the level of inclusion demanded by democracy means surrendering the conditions for proper deliberation. But one place to begin questioning such a negative prognosis is to note a fundamental difference between a macro-process and a micro-process beyond merely the number of participants. A micro-process can be carefully designed and planned in fairly elaborate detail and can therefore be infused self-consciously with normative values either by elites framing the process or by the actors themselves, as we saw at the beginning of the deliberations of British Columbia’s Citizens’ Assembly. At the macro-level of mass society, by contrast, although there is an opportunity to try to foster the conditions for deliberation, the capacity to do so is much less. What is feasible in this context needs to be assessed against the reality of what happens and how voters behave in a referendum campaign largely on their own initiative. As Parkinson explains:

The macro account ... is much more of an attempt to provide a new descriptive theory of democracy, one that accounts better than previous theories for the real processes of opinion formation, claim making and argumentation that go on in democracies, especially theories which focus solely on voting without considering how options come to a vote in the first place.⁴⁸

⁴⁶ Parkinson, ‘Beyond “Technique”’. See also Michael Walzer, ‘Deliberation, and What Else?’ in Stephen Macedo (ed), *Deliberative Politics: Essays on ‘Democracy and Disagreement’* (OUP 1999).

⁴⁷ Walzer, ‘Deliberation, and What Else?’, 68. Dryzek calls this the ‘large scale’ problem: John S Dryzek, ‘Legitimacy and Economy in Deliberative Democracy’ (2001) 29 *Political Theory* 651, 652.

⁴⁸ Parkinson, ‘Beyond “Technique”’, 4-5.

Perhaps, therefore, we need to look at mass participation and micro-deliberation as entirely different exercises in participation. While each is part of a wider democratic process, they are themselves radically different exercises, with very different goals and achievable outcomes.

3. Distinguishing participation from deliberation

It is useful to begin by considering the difference between the *goals* of participation versus those of deliberation. Participation focuses on *who* is involved in the decision-making process, while deliberation is more concerned with *how* that involvement takes place. Participation thus pursues democratic/majoritarian decision-making; maximising involvement; and achieving inclusiveness. Other features can be important to both participation and deliberation, for example representativeness and public outreach and information

One way to assess participation is by voter turnout, for example in referendums. But this does not necessarily tell us much about the process of participation or the goods of participation.

It is in fact in thicker forms of participation that we can find a link to deliberation. This brings us to issues of awareness-raising and engagement with the issues. Taking the 2014 Scottish independence referendum, which was lauded as a forum for deep citizen engagement, there has been a focus not only upon turnout (84%), but also upon the use of social media, television and radio audiences. But is this engagement really deliberative: people may be bombarded with information or seek it out, but to what extent was this properly understood and discussed with others? Furthermore, does the high turnout mask the lower engagement of women and generally underrepresented groups?⁴⁹ Another issue is the extent to which engagement varies widely depending upon the perceived salience of the issue to voters.⁵⁰ The voting levels in independence referendums compared to electoral reform referendums seem to suggest that this is certainly the case.

Deliberation is different from mere participation in being about discussion and exchange of reasons as earlier discussed. It can in fact be a highly idealised notion. For Rawls people will listen, consider other views (and where possible discuss their views with others); the implication being that this will be done in good faith, with participants open to changing their minds (transforming preferences)⁵¹ and willing to compromise.⁵² This notion of compromise implies finally that the ultimate aim of deliberation is the search for consensus where that is feasible.⁵³

But this idealised notion perhaps obscures the fact that participation and deliberation are not binaries and in the name of democracy must not be binaries. The ways in which micro-deliberative bodies are being designed seek to ensure participation through representation. Moreover, they are structured so as to ideally work towards an exchange of reasons in a Rawlsian way. Thus, the hope is that where possible they will arrive at consensus even on a societal basis, where losers agree *to* if not *with* the decision. It may be, therefore, that we are not faced with an either/or choice, but simply with two different sets of considerations. What is clear

⁴⁹ Silvia Suteu, 'Women and Participatory Constitution-making' in Helen Irving ed., *Gender and Constitutions* (Edward Elgar Publishing 2017), 19.

⁵⁰ Lawrence LeDuc, 'Opinion Change and Voting Behaviour in Referendums', *European Journal of Political Research* 41:6 (2002) 711.

⁵¹ Rawls, *The Law of Peoples*, 138-39.

⁵² Barber, *Strong Democracy*, 151.

⁵³ Chambers, 'Deliberative Democratic Theory', 309.

therefore is that structures still lack emphasis on fostering a proper linkage between the micro and macro levels if good micro processes are to help lead to wide popular participation, and if wide popular participation in, for example a referendum, is to involve a meaningful exchange of reasons by citizens.

4. Linking Deliberation to Participation: recent examples in constitutional practice

Recent experiments do seem to offer useful lessons. We will take Iceland and Ireland as contrasting examples of how vital it is to build linkages between participation and deliberation throughout. Following the 2012 referendum, the Icelandic Parliament failed to discuss the constitutional bill for a third time, as was required by the process, and the new constitution dropped amidst other priorities in the general election in 2013. A new procedure to amend the existing constitution by 2017 was instead proposed and thus Iceland's crowdsourced constitution 'ultimately fell at the final hurdle'.⁵⁴ Iceland's failure to adopt the popularly produced constitutional draft has been attributed at least in part to the late involvement of political elites who had felt alienated from the process.⁵⁵ In contrast, the initial success of the Irish process was explained as being in no small measure due to the respectful interactions within the convention and to the fact that politicians involved did not appear to dominate the debates.⁵⁶ Despite the lack of progress on some of the Convention's recommendations,⁵⁷ the Irish experience gives hope to those looking for a middle way between a fully citizen-driven process and a wholly elite one, and for a way to ensure the former gain buy-in from the political class.

One of the fundamental differences between participatory mechanisms and deliberative ones is the type of decision-making rules which govern them. The two exercises in mini-public deliberation in Iceland and Ireland did not, or not initially, mandate consensus decision-making. In Iceland, the rules indicated that majority voting was to be used, although members of the Constitutional Council opted to seek consensus on all decisions – a choice likely facilitated by the body's small size. Conversely, in Ireland, the Constitutional Convention was to employ majority voting, with the (appointed) Chairman empowered to cast the deciding vote. While opinions among members were more evenly split on some issues on the agenda, they were strongly in favour of amending the constitution to allow for the recognition of same-sex marriages and civil partnerships (79% in favour).⁵⁸ As in the Icelandic case, this near-unanimity among convention members was presented as proof of the salience of the issue among the public

⁵⁴ Hélène Landemore, 'Iceland's 'Crowd-sourced' Constitution May Have Stalled, but the Experience Offers Lessons for Constitutional Reform in Other States' *LSE EUROPP Blog*, 24 July 2014 <http://blogs.lse.ac.uk/europpblog/2014/07/24/icelands-crowd-sourced-constitution-may-have-stalled-but-the-experience-offers-lessons-for-constitutional-reform-in-other-states/> accessed 10 July 2015.

⁵⁵ BT Bergsson and P Blokker, 'The Constitutional Experiment in Iceland' in E Bos and K Pocza (eds) *Verfassungsgebung in konsolidierten Demokratien: Neubeginn oder Verfall eines Systems?* (Baden-Baden, Nomos Verlag, 2014) 171.

⁵⁶ Jane Suiter et al, 'It's Good to Talk: Citizen-Politician Deliberations in Ireland's Constitutional Convention of 2012-14', Paper presented at ECPR General Conference, Glasgow, 3-6 September 2014 (on file with author).

⁵⁷ The majority of the Irish Constitutional Convention's recommendations were either ignored or rejected. See David Farrell, 'Final Report Card on the Government's Reactions to the Irish Constitutional Convention' (23 January 2016), <https://politicalreform.ie/2016/01/23/final-report-card-on-the-governments-reactions-to-the-irish-constitutional-convention/>.

⁵⁸ Third Report of the Convention on the Constitution Amending the Constitution to provide for same-sex marriage, June 2013, <https://www.constitution.ie/AttachmentDownload.ashx?mid=c90ab08b-ece2-e211-a5a0-005056a32ee4>.

and may have helped force the hand of otherwise reluctant politicians to put the matter to a popular referendum.⁵⁹

5. Conclusion: Participation and deliberation or participation versus deliberation?

Several conclusions may be drawn. The first is that more awareness is needed of the fact that participatory and deliberative constitution-making processes are indeed different. They pursue different goals, operate based on different dynamics, and are more suited towards producing certain types of goods and not others. Thus, participation – exemplified by the popular referendum – aims to mobilise large numbers of citizens towards deciding, by way of a yes/no vote, on a concrete issue typically framed by political actors. Its success tends to be evaluated on the basis of voter turnout and clarity of the vote. Deliberation – exemplified by citizens’ assemblies and constitutional conventions – is more concerned with the quality of decision-making and its capacity to induce public reason and reach consensus. Its success, therefore, is less easily quantifiable and may be determined in terms of reflection, responsiveness, and exchange of reasons.

What is clear is that more thought is needed when considering how to integrate the two types of processes. The popularity of both referendums and micro-deliberative forums continues to rise, as does their joint use – most often in the form of referendums set up to validate the recommendations of constitutional conventions and citizens’ assemblies. Ireland has embarked on a new participatory and deliberative exercise, with a second Constitutional Convention set up in late 2016 to deliberate on, among other issues, constitutional reform around abortion. The Convention’s recommendations would again require referendum approval in order to be implemented. In Scotland, if the Scottish Government is successful in taking forward a proposal for a second independence referendum, it will be interesting to see if it learns lessons from the 2014 process in terms of enhancing citizen deliberation. Following its 2017 provincial election, British Columbia looks likely to pursue a participatory process to enact electoral change once more. Political actors have promised a 2018 referendum on switching to proportional representation, as well as to ‘work together in good faith to consult British Columbians’ on the precise form of the new electoral system.⁶⁰ The search for how best to connect referendums and small group deliberations could thus not be more timely.

We need to consider more thoroughly how these distinct processes interact: how they reinforce and/or undermine each other’s promise of more legitimate constitution-making. This chapter has suggested several aspects to consider when disentangling these separate dynamics. We discussed the elite control syndrome and deliberation deficit of referendums, with their focus on passive voting and the mere aggregation of individual views. We also highlighted the shortcomings of small group deliberative exercises, including the legitimacy problems attached to their membership, their participation deficit, and the fact that they cannot, on their own, stand as acts of demotic authorship. A paradox thus emerges which sees participatory and deliberative exercises as incapable of, on their own, overcoming these limitations.

⁵⁹ Johan A. Elkink, ‘Understanding the 2015 Marriage Referendum in Ireland: Constitutional Convention, Campaign, and Conservative Ireland’, Geary WP2015/21, 9 November 2015, 6, <http://psai-pdd.org/sites/default/files/document/gearywp201521.pdf>.

⁶⁰ See ‘2017 Confidence and Supply Agreement between the BC Green Caucus and The BC New Democrat Caucus’, 1(b)(i), <http://www.documentcloud.org/documents/3761692-349886757-2017-Confidence-and-Supply-Agreement.html>.

Interesting examples exist of genuine attempts to link the deliberation of the small group to the participation of the wider citizenry: Iceland and Ireland stand out here, offering warnings as well as positive lessons. There will never be a perfect linkage between small group and full electoral decision-making, nor a full popular replication at mass level of the types of deliberation possible among small, motivated groups. But what is clear is that continued experiments in linking the two processes offer more and more guidance as to the various imaginative ways in which citizens can be better engaged in deliberative constitutional change.